UK Supreme Court Sleep-in Workers Decision

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On 19 March 2021, the UK Supreme Court[1] handed down its judgment which completed many years of litigation in these cases over the issue of whether "sleep-in" workers were entitled to be paid the National Minimum Wage (NMW) during the whole of the periods when they were required to be at work but were permitted to be asleep.[2]

The introduction of a National Minimum Wage was a manifesto pledge of the Labour Government elected at the 1997 General Election. The result was the National Minimum Wage Act 1998, which provides that workers must be paid at a rate which is not less than the hourly rate of the minimum wage, such rate being specified by the Government from time to time. The detailed provisions for calculating a worker's hourly rate of pay are contained in regulations made under the 1998 Act, most recently the National Minimum Wage Regulations 2015. There are two basic elements to this calculation – the amount of remuneration that the worker receives, and the number of hours that are to be treated as being worked. The Regulations contain a detailed framework for determining what counts towards remuneration for the purposes of the NMW, and how the worker's reckonable hours of work are to be determined in order to answer the ultimate question of whether, in a particular period, the worker has been paid at or below the NMW rate.

Although the regulations are complex, the essential question which had to be answered in these appeals in order to decide whether time was reckonable for NMW purposes was whether the workers were actually undertaking work throughout their night shifts or, alternatively, whether they were "*available, and required to be available, at or near a place of work for the*

[1] Lord Kerr died after the hearing of the appeal, and with the consent of the parties the case was determined by the remaining four members of the Court: Lady Arden, Lord Carnwath, Lord Wilson and Lord Kitchin.
[2] In *Shannon*, the ET's judgment was given in November 2014, the EAT's judgment in September 2015 and the Court of Appeal's judgment in July 2018. In *Tomlinson-Blake*, the ET's judgment was given in August 2016, the EAT's judgment in April 2017 and the Court of Appeal's judgment in July 2018.

purposes of working". If they were only available for work, then time would not count if they were not "*awake for the purposes of working*", or if they were at home.[3]

Mrs Tomlinson-Blake was a care support worker who provided care to two vulnerable adults in their own home. When she worked at night, she was permitted to be asleep but had to remain at her place of work. She had no duties to perform apart from to "keep a listening ear out" while asleep and to attend to emergencies. She was paid an allowance for her night shifts, plus one hour's pay at NMW rate. She contended that she was entitled to be paid at NMW for each hour of such shifts.

Mr Shannon was a night care assistant at a residential care home. He was provided with free accommodation at the care home and was paid a fixed amount. He was required to be present in his accommodation from 10 pm to 7 am, during which time he was permitted to sleep but had to assist if the care worker on duty required him to do so. He contended that he was entitled to be paid at NMW for each hour that he was required to be on call.

The appeal therefore concerned the issue of what hours were to be counted as working hours under the NMW Regulations in order to then determine whether the workers' overall hourly rate of pay was above or below the level of the NMW. There were two types of working arrangements in the two appeals. Mrs Tomlinson-Blake was a 'time worker', i.e. her pay varied according to the number of hours worked. Mr Shannon was a salaried worker, i.e. he was paid a fixed sum for his work, at weekly intervals. The issue in both their appeals turned on how to treat time which they were required to spend at their places of work but when they were permitted to be (and, with limited exceptions, actually were) asleep.

The Supreme Court concluded, in the leading judgment of Lady Arden (with which the other members of the Court agreed), that as the workers were permitted to sleep during their sleep-in shifts and were only required to respond to emergencies, the hours in question were not to be included in the NMW calculation, unless the worker was awake for the purpose of working. The workers were not, therefore, entitled to treat the time when they were asleep as counting towards the computation of their entitlement to NMW. In doing so, the Supreme Court relied heavily on the pre-legislative recommendation of the Low Pay Commission (LPC) in its first report, published in June 1998, that sleep-in workers should receive an allowance and that their shifts should not be subject to the NMW, unless they were awake for the purpose of working. The Supreme Court also disapproved several earlier authorities at Court of Appeal and Employment Appeal Tribunal level, including *British Nursing Association v Inland*

[3] See Regulation 32 of the National Minimum Wage Regulations 2015 (applicable to 'time work'). Similar exclusions appear in the Regulations in respect of salaried work.

Revenue [2002] EWCA Civ 494, [2003] ICR 19 (where the Court of Appeal had upheld a finding that call centre workers who worked at home when on night shift and were permitted to sleep when not taking calls were working, for NMW purposes, throughout the whole of their shifts).

This decision will have obvious and significant implications for workers in the care sector who are required to undertake the sort of "sleep-in" shifts seen in these cases, and for their employers – although as the Supreme Court upheld the earlier judgment given by Underhill LJ in the Court of Appeal in both these appeals, those workers and their employers will have had some time to consider their positions. Lady Arden also made clear at paragraph 57 of her judgment her view that a "sleep-in" worker was one in a situation where "*… the principal purpose and objective of the arrangement is that the employee will sleep at or near the place of work, and responding to any disturbance during the time allocated for sleep must be subsidiary to that purpose or objective…*" It may be that the situation in other employment contexts with different facts is not so clear-cut.

Some of the statements made by the members of the Supreme Court may also be the subject of consideration in future litigation. At paragraph 35 of her judgment, Lady Arden stated that it was clearly not the position that because a worker was subject to the employer's instructions they were entitled to be paid at NMW and referred to there being "*many situations when a worker has to act for the benefit of his employer which do not count for time work purposes, for example when he travels between home and work.*" She emphasised this point at paragraph 37 where she stated that, "*… not all activity which restricts the worker's ability to act as he pleases is work for the purposes of the NMW…*" That Lady Arden evidently considered that there were many other types of situations, beyond the example given of travel to and from work, in which workers would be acting for their employer's benefit and would be subject to some form of restriction imposed by their employer but not entitled to have the time reckoned for the purposes of NMW, may result in further litigation on this issue. This is particularly so given that on the particular facts of Mrs Tomlinson-Blake's case, at paragraph 70 of her judgment Lady Arden expressly equated the look-out which Mrs Tomlinson-Blake was required to keep with the example she had already given of travelling to and from work:

> "*Mr Jones submits that even when asleep Mrs Tomlinson-Blake had to have a "listening ear" but like the Court of Appeal I do not consider that having a listening ear leads to the conclusion that she was working for NMW purposes. A worker must travel from home to the employer's place of business, but it does not automatically follow that the travelling time falls within the calculation of hours for the purposes of the NMW.*"

Also of potentially wider application are the comments made by the members of the Supreme Court on the applicability of the NMW legislation to those who work at home, a topic of particular interest in light of the situation that has arisen in the COVID-19 pandemic. When overruling the decision in the *British Nursing* case, both Lady Arden and Lord Kitchin addressed the question of when home workers might be undertaking activities for NMW purposes, given that the NMW Regulations require home workers to be undertaking work in order for time to be reckonable for NMW purposes. Lord Carnwath (with whom Lord Wilson agreed), although agreeing that *British Nursing* should not be treated as authoritative, preferred to express no view on this point:

> "*… The treatment of home-working is not before us, but it may well become important in other cases, particularly arising out of the period of the Covid-19 lockdown. In those circumstances, I would agree with Lady Arden in holding that the decision and reasoning of the Court of Appeal should no longer be regarded as authoritative. I would do so on the simple ground that the Court of Appeal (following the employment tribunal) could not properly have held that the employees were working for the whole of the period of their shifts; and that it is not in my view necessary, in the context of the present appeals, to address the potentially difficult issues arising out of the treatment of any particular activities, or lack of activities, within that period. I would reserve further comment for a case where the same or similar issues arise for actual decision.*"

It is therefore very possible that the question of whether particular types of activities carried out by home workers results in the time for them being counted for NMW purposes will in due course feature again at Court of Appeal or even Supreme Court level, particularly given that Lord Kitchin considered at paragraph 99 of his judgment that:

> "*… there are no doubt many kinds of work which can be and are performed from home and in which tasks only come up intermittently but where a person is still performing time work in the periods between those tasks. It is possible, though I express no view on the point and there is no satisfactory finding, that the busier periods of the night shift in British Nursing fell into this category. Moreover, I also agree with Underhill LJ that if an employee is actually working for the relevant period then, notwithstanding that the work may only generate tasks intermittently, it makes no difference whether she is doing so at home or at work. Nor is a finding that a person is actually working necessarily inconsistent with that worker making a cup of tea or even having a nap between tasks, as Underhill LJ recognised at para 40 of his judgment. It would not inevitably follow that, for the relevant period, the worker is expected to sleep and not to perform any substantive activities.*"

Lady Arden expressed a similar view at paragraph 57 of her judgment. Of crucial importance in these sorts of cases will, therefore, be the fact-finding exercises undertaken by Employment Tribunals at first instance. As Lady Arden stated at paragraph 61 of her judgment:

> "*It is important that tribunals should appreciate the range of distinctions that fall to be made and make appropriate findings. The function of making these distinctions has been left to the tribunals: the LPC's Fourth Report (para 3.58) explains that arrangements can vary considerably on their facts and that it would have been difficult for the regulations to capture the diversity of individual cases…*"

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